

BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S RESPONSE TO THE CO-LAWYERS OF CIVIL PARTIES' INVESTIGATIVE REQUEST CONCERNING FORCED MARRIAGE AND FORCED SEXUAL RELATIONS

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby submits, pursuant to Rule 55(10) of the ECCC Internal Rules (“Rules”), this Response to the Co-Lawyers for Civil Parties’ Second Request for Investigative Actions concerning forced marriages and forced sexual relations, filed on 15 July 2009 (“Request”).¹ The Request asserts that the “Office of the Co-Investigating Judges (“OCIJ”) has been seized with a Supplementary Submission to investigate five specific complaints into factual matters relating to forced marriages and forced sexual relations”² but that “no investigative action has yet been taken by the OCIJ nor does it appear that any will be taken in the future.”³ Consequently, the Co-Lawyers for the Civil Parties (“Civil Parties”) request “investigative action concerning the occurrence of forced marriages in the DK period and the determination of the legal classification.”⁴ In the Request, the Civil Parties impermissibly seek to associate forced marriage with other crimes in order to categorize it within ECCC’s jurisdiction⁵ under the Agreement creating the ECCC,⁶ or as a form of “other inhumane acts”⁷ under the Law establishing the Court.⁸ On its own, forced marriage as a crime against humanity does not fall within the ECCC’s jurisdiction. The Request also fails to prove that forced marriage was a crime under international law in 1975-79. In the absence of this proof, the OCIJ is prohibited from investigating this alleged crime.

I. SUMMARY OF ARGUMENT

1. The Defence will show that:
 - A. Forced marriage as a separate crime against humanity does not fall within the jurisdiction of the ECCC under the Establishment Law or Agreement either as a separate crime in its own right; as inhumane acts; or as rape, enslavement or forced pregnancy;
 - B. Forced marriage was not a crime against humanity under Cambodian or customary international law in 1975-79;
 - C. There is no obligation on the OCIJ to prosecute crimes against humanity;

¹ The Request was notified on 23 July 2009.

² *Id.*, para. 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.*, para. 10.

⁶ Agreement between the UN and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea 2003 (“Agreement”).

⁷ Request, paras. 19-22.

⁸ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with amendments promulgated 27 Oct 2004 (“Establishment Law”).

- D. Crimes against humanity under customary international law are not directly applicable in a domestic Cambodian court;
- E. Crimes against humanity under customary international law contain an element of discriminatory intent or the ECCC may lawfully limit its jurisdiction to include this element.

II. LAW

2. The Defence incorporates by reference its prior submissions on the law relating to: (1) Preliminary Investigations and Introductory and Supplementary Submissions;⁹ (2) requests for investigative action;¹⁰ and (3) the substantive law applied at the ECCC.¹¹

III. ADMISSIBILITY OF INVESTIGATIVE REQUEST

3. There is no mention of forced marriage or forced sexual relations in the Introductory Submission (“IS”) filed by the Office of the Co-Prosecutors on 18 July 2007 against Nuon Chea, Ieng Sary, Khieu Samphan, Ieng Thirith and Duch.¹² On 30 April 2009, the Office of the Co-Prosecutors (“OCP”)¹³ filed a Supplementary Submission in response to the OCIJ’s forwarding order¹⁴ relating to four civil party complaints “containing allegations of forced marriage, non-consensual sexual relations and threats of death if the persons refused to have sexual relations.”¹⁵ The Supplementary Submission limits the additional investigation to these “specific complaints.”¹⁶
4. The Supplementary Submission further authorizes the OCIJ to investigate “any other facts provided that those facts assist in determining either (a) the jurisdictional elements necessary to establish whether the factual matters referenced in paragraph 2 constitute

⁹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Ieng Sary’s Response to the Co-Lawyers of Civil Parties’ Investigative Request Concerning the Crime of Enforced Disappearance & Request for Extension of Page Limitation, 5 August 2009, paras. 2-4 (“Enforced Disappearance Response”).

¹⁰ *Id.*, para. 5.

¹¹ *Id.*, paras. 6-9.

¹² *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Introductory Submission, 18 July 2007. Duch was separated by a decision of 19 September 2007. *See* Update by the Co-Investigating Judges, 1 November 2007, where the public is informed that “on 19 September 2007, [the OCIJ] decided, in order to ensure good judicial administration, to order the separation of the DUCH case.”

¹³ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors’ Response to the Forwarding Order of the Co-Investigating Judges and Supplementary Submission, 30 April 2009 (“OCP Response”).

¹⁴ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Forwarding Order, 13 March 2009.

¹⁵ OCP Response, para. 1.

¹⁶ *Id.*, para. 2.

- crimes within the jurisdiction of the ECCC or (b) the mode of liability of NUON Chea, IENG Sary, KHIEU Samphan or IENG Thirith with respect to such matters.”¹⁷
5. The OCP’s request/authorization for the OCIJ to investigate “any other facts” is impermissibly vague. The OCP sets the limits of the OCIJ’s judicial investigation by the IS or Supplementary Submission. The OCIJ is bound by these limits.¹⁸ The OCP may not delegate its responsibility to the OCIJ by permitting the OCIJ to investigate “any other facts” as it deems fit. As such, this unlimited scope of investigation requested by the OCP in the Supplementary Submission must be disregarded. To the extent, however, that the Civil Party Request is limited to the OCIJ conducting investigations of the specific facts raised in the five Civil Party complaints, this falls properly within the scope of the judicial investigation.
6. In the Request, the Civil Parties provide no support for their assertion that “no investigative action has yet been taken by the OCIJ, nor does it appear that any will be taken in the future.”¹⁹ Regrettably, the lack of information provided by the OCIJ on the strategy, procedures and scope of the judicial investigation is alarming, leaving the parties to speculate as to whether, and if so, when certain facts will be investigated by the OCIJ.²⁰ Consequently, the Defence does indeed support the right of the Civil Parties to request information on the status of the OCIJ investigation relating to specific facts within the IS or Supplementary Submission. Simply, the OCIJ must inform all the parties - in a prompt and transparent manner - on the status of this specific aspect of the investigation.

IV. ARGUMENT

A. Forced marriage as a separate crime against humanity does not fall within the jurisdiction of the ECCC

1. Forced marriage is not included as a separate crime against humanity in the Establishment Law

7. The Establishment Law does not create forms of liability or substantive crimes; it merely delineates the subject-matter, temporal and personal jurisdiction of the ECCC. Article 5 of the Establishment Law does not enumerate forced marriage as a crime against

¹⁷ *Id.*, para. 6.

¹⁸ Rule 55(2).

¹⁹ Request, para. 1.

²⁰ See generally *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Third Request for Investigative Action, 21 May 2009.

humanity.²¹ It lists certain specific acts as constituting crimes against humanity if they are “committed as part of a widespread or systematic attack directed against any civilian population” on certain discriminatory grounds. Forced marriage is not one of the listed acts. By deliberately and unequivocally excluding forced marriage from its jurisdiction under Article 5, the OCIJ is prohibited from investigating and prosecuting any Charged Persons for this alleged offence.

2. Forced marriage is not specifically included as a crime against humanity in the Agreement

8. Both the Establishment Law and the Agreement provide that the former is the only instrument which may lawfully delineate the ECCC’s jurisdiction.²² If the OCIJ considers that the Agreement may also delineate the ECCC’s jurisdiction, and there is therefore a conflict between the Establishment Law and Agreement, the Establishment Law must prevail.²³
9. Even assuming the OCIJ may rely solely upon the Agreement to delineate jurisdiction rather than the Establishment Law, the Agreement does not permit forced marriage to be applied at the ECCC. The Civil Parties do not rely upon the specific acts listed as amounting to crimes against humanity in Article 7 of the Statute of the International Criminal Court (“ICC”)²⁴ and adopted by the Agreement²⁵ to support their assertion that forced marriage was within the ECCC’s subject matter jurisdiction. This is in marked contrast with their first investigative request concerning enforced disappearances.²⁶ This difference is plain: the ICC definition of crimes against humanity conspicuously omits forced marriage from its jurisdiction.²⁷ Assuming therefore, that the Agreement may lawfully adopt the expanded definition of crimes against humanity in the ICC Statute²⁸ to delineate the jurisdiction of the ECCC for crimes allegedly committed in 1975-79, it still does not grant the ECCC subject-matter jurisdiction to prosecute this alleged crime.

3. Forced marriage does not amount to other inhumane acts under the Establishment Law

²¹ Establishment Law, Article 5.

²² See Enforced Disappearances Response, paras. 16-18.

²³ *Id.*, paras. 19-20.

²⁴ Request, paras. 5-8. Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998.

²⁵ Agreement, Article 9.

²⁶ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Co-Lawyers of Civil Parties First Investigative Request Concerning the Crimes of Enforced Disappearance, 30 June 2009, para. 5.

²⁷ Request, para. 11.

²⁸ This Statute was drafted in 1998 and only came into force four years later on 1 July 2002.

10. The Civil Parties argue in the alternative that ECCC has subject matter jurisdiction over enforced disappearances as a crime against humanity under the category of “other inhumane acts” as provided in Article 5 of the Establishment Law.²⁹ The phrase “other inhumane acts” appears to fail to conform to the principle of specificity, which provides that “criminal rules must be as specific as possible”.³⁰ In *Kupreskić*, while the Trial Chamber held that enforced prostitution falls under this category of crimes against humanity, it did not include forced marriage.³¹ Furthermore, in making this finding regarding enforced prostitution, the Trial Chamber did not specify the precise legal basis of this assertion, merely referring to “most international instruments.”³²
11. The Civil Parties rely upon jurisprudence from the Special Court for Sierra Leone (SCSL) in support of the claim that forced marriage amounts to inhumane acts.³³ This does not support the conclusion that forced marriage constitutes inhumane acts. The Trial Chamber in *Sesay* merely highlighted that the Prosecution “charges the Accused with “other inhumane acts” as a crime against humanity under Article 2 of the Statute.”³⁴ It does not confirm that forced marriage, in the absence of any other associated crime, actually constitutes inhumane acts as a crime against humanity.

4. Forced marriage does not constitute Rape, Enslavement or Forced Pregnancy under Article 5 of the Establishment Law

12. The Request is far from clear with regards to the relationship between forced marriage, rape, enslavement and forced pregnancy. They are separate crimes, and yet rape, enslavement and forced pregnancy are treated as sub-categories of forced marriage.³⁵ This confusion is perhaps deliberate: on the one hand the Civil Parties are seeking to define forced marriage so that it falls within the ECCC’s jurisdiction, while on the other hand simultaneously defining forced marriage so that it does not violate the rules against cumulative convictions. The mental gymnastics required to avoid this irreconcilable contradiction is illogical and impermissible.

²⁹ Request, paras. 19-22.

³⁰ ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW*, (2nd ed. Oxford University Press, 2008), p. 41 (“CASSESE”).

³¹ *Prosecutor v. Kupreskić et al.*, IT-95-16-T, Judgment, Trial Chamber, 14 January 2000, para. 566.

³² *Id.*

³³ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, Judgment, Trial Chamber, 25 February 2009, para. 164 (“*Sesay*”).

³⁴ *Id.*

³⁵ Request, para. 31. The Civil Parties request the OCIJ to conduct a “full investigation on the crimes of forced marriage, namely rape, enslavement, forced marriage and forced pregnancy.”

13. The Civil Parties assert that “international tribunals have recognized forced marriage to be a crime against humanity.”³⁶ As such, the essence of the Request appears to be that forced marriage should be prosecuted as a separate crime from other acts such as rape or enslavement which are some of the enumerated acts in statutory provisions on crimes against humanity. However, cognizant of the fact that forced marriage does not figure among the list of enumerated acts in either the Establishment Law or Agreement, the Civil Parties assert, instead, that for jurisdictional purposes forced marriage may amount to the crimes of rape, enslavement and forced pregnancy. As such, it would allegedly fall within the ECCC’s jurisdiction under Article 5 of the Establishment Law as well. This attempt to circumvent the established jurisdictional categories set out in Establishment law must be rejected. It is improper to argue that for jurisdictional purposes forced marriage is rape, enslavement or forced pregnancy so as to allegedly fall within the ECCC’s jurisdiction, and yet ultimately seek to apply criminal liability for forced marriage as a separate crime in its own right. The same act may not metamorphose between one crime and another depending on the examination that is being undertaken. An assessment of jurisdiction and applicability of substantive law must be made on the basis of the same alleged crime.
14. Forced marriage does not intrinsically include the crimes against humanity of rape, enslavement or forced pregnancy. Although the Civil Parties highlight that forced marriage “can include” or be associated with other crimes,³⁷ these crimes are not an inevitable consequence of forced marriage. Indeed, for the Appeals Chamber of the Special Court for Sierra Leone, the crime of ‘forced marriage’ is a non-sexual offence.³⁸ Therefore, the fact that on some occasions forced marriage may have led to these crimes, does not permit the inclusion of forced marriage as a separate crime within the ECCC’s jurisdiction.
15. Furthermore, if a Charged Person was prosecuted for both forced marriage and in addition either rape, enslavement or forced pregnancy for the same alleged acts, this would violate the rules on cumulative convictions. There are at least five major tests used by international tribunals and domestic courts to determine whether cumulative convictions

³⁶ *Id.*, para. 7.

³⁷ *Id.*, para. 6.

³⁸ *Prosecutor v. Brima, Kamara, and Kanu*, SCSL-04-16-A, Judgement, Appeals Chamber, 22 February 2008, paras. 181 & 196 (“AFRC Appeal Judgement”).

will be allowed;³⁹ some of these tests may infringe upon fundamental rights of the accused.⁴⁰ The OCIJ has previously held on this issue that cumulative convictions are possible as long as “each of these international offences has a distinct element not contained in the others and protects different values.”⁴¹ An element is materially distinct from another if it requires proof of a fact not required by the other element.⁴² However, the Civil Parties did not specify how these crimes contain a materially distinct element that does not exist in the other.⁴³ If they do contain a separate element from rape, enslavement or forced pregnancy, then they do not fall within the ECCC’s jurisdiction under Article 5 as one of those crimes. If they do not contain a separate element then they violate the rule against cumulative convictions. Either way, they may not be charged at the ECCC.

16. Enslavement, under the ICC Statute means “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons.”⁴⁴ The International Criminal Tribunal for the former Yugoslavia (“ICTY”) Trial Chamber clarified this definition by convincingly propounding a set of elements in *Kunarac and others*.⁴⁵ This definition would seem to exclude the marital element of forced marriage.
17. Rape, as defined in international criminal law is constituted by “a physical invasion of a sexual nature, committed under circumstances which are coercive.”⁴⁶ Yet again, this definition would seem to exclude the marital element of forced marriage.
18. Judges have attempted to distinguish between the crime of sexual slavery and the practice of forced marriage. While forced marriage may involve components of rape, sexual violence and enslavement, these are not determinative of its existence. The crucial element of forced marriage is the mental and moral trauma resulting from the imposition, by threat or force arising from the perpetrator's words or other conduct, of a forced

³⁹ These tests include the “*Akayesu* Different Elements or Interests Test,” the “*Tadić* Totality of Culpable Conduct Test,” the “*Kupreškić* Blockburger and Different Value Test,” the “*Čelebići* Two-Prong Materially Distinct Element Test” and the “Judges Hunt and Bennouna’s Substantive Distinct Element Test.”

⁴⁰ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC03), Ieng Sary’s Submissions Pursuant to the Decision on Expedited Request of Co-Lawyers for a Reasonable Extension of Time to File Challenges to Jurisdictional Issues, 7 April 2008, paras. 17-25.

⁴¹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Provisional Detention Order, 14 November 2009, para. 9.

⁴² *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, para. 412.

⁴³ Request, para. 15.

⁴⁴ Statute of the ICC, Article 7(2)(c).

⁴⁵ *Prosecutor v. Kunarac and others*, IT-96-23 & 23/1, Judgement, Trial Chamber, 22 February 2001, paras. 542-543: “Under this definition, indications of enslavement include elements of control and ownership; the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent.”

⁴⁶ *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, para. 598.

conjugal association by the perpetrator over on the victim.⁴⁷ The SCSL Appeals Chamber determined that forced marriage is a separate offence and does not fall under the heading of sexual slavery.⁴⁸ It is furthermore accepted in international law that forced marriage constitutes a separate international crime.⁴⁹ As such, forced marriage may not fall within this category under Article 5 of the Establishment Law.

19. Forced pregnancy is also not listed in Article 5 of the Establishment Law and therefore, even if forced marriage comes within this category, it still may not be applied at the ECCC. It has also not been defined by international jurisprudence. It is one of the enumerated crimes within the ICC definition of crimes against humanity⁵⁰ which is adopted by the Agreement.⁵¹ However, from the elements of crimes under the ICC Statute, the elements of this crime in 1998, twenty years after Democratic Kampuchea, appear to be the following:

1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁵²

20. This definition of forced pregnancy would appear to exclude the marriage requirement of forced marriage. Forced marriage also does not require an intention to alter the ethnic

⁴⁷ *Prosecutor v. Brima, Kamara, and Kanu*, SCSL-04-16-T, Judgement, Trial Chamber, Partly Dissenting Opinion of Justice Doherty, 20 June 2007, paras. 52-53.

⁴⁸ AFRC Appeal Judgement. The Appeals Chamber found relevant differences between forced marriage and sexual slavery and concluded that: "(...) in the context of the Sierra Leone conflict, forced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim." at para. 183. *See also* Neha Jain, *Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution*, 6 J. INT'L CRIM. JUST. 1013, 1021 (2008): "The [Appeals] Chamber also distinguished between forced marriages and sexual slavery on the ground that, while forced marriages may certainly involve nonconsensual sex and deprivation of liberty (elements of sexual slavery), they have additional elements: a forced conjugal association resulting in great physical and mental suffering; and a relationship of exclusivity between the 'couple', with potential disciplinary repercussions for breach of the arrangement. This implied that forced marriages, unlike sexual slavery, were not predominantly a sexual crime."

⁴⁹ Micaela Frulli, *Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a 'New' Crime against Humanity*, 6 J. INT'L CRIM. JUST. 1033, 1036 (2008): "However, the practice of forced marriage as it was extensively carried out in Sierra Leone is not fully described by any of the single crimes enumerated in the SCSL Statute. Forced marriage is more than the sum of its components." *See also* Monika Satya Kalra, *Forced Marriage: Rwanda's Secret Revealed*, 7 U.C. DAVIS J. INT'L L. & POL'Y 197, 215 (2001).

⁵⁰ Statute of the ICC, Article 7 (1)(g)(4).

⁵¹ Agreement, Article 9.

⁵² Article 7 (1)(g)(4) Crime against humanity of forced pregnancy. Elements of Crimes, ICC-ASP/1/3.

composition of any population. As such, forced marriage may not fall within the ECCC's jurisdiction based on forced pregnancy.

B. Forced marriage was not a crime against humanity under Cambodian or customary international law binding in Cambodia in 1975-79

21. The Civil Parties do not assert in the Request that forced marriage was a crime under Cambodian law in 1975-79. The sole basis for attributing criminal liability for crimes allegedly committed on this basis in 1975-79 is therefore customary international law, which can be created only through general and consistent state practice and *opinio juris*.⁵³
22. According to the Civil Parties, "international tribunals have recognized forced marriage to be a crime against humanity."⁵⁴ This is incorrect. Forced marriage has been recognized by only one hybrid (not fully international) tribunal, namely the SCSL.⁵⁵ This tribunal had jurisdiction over crimes that were committed in "the territory of Sierra Leone since 30 November 1996."⁵⁶ As such, any determination by that Court that forced marriage was a crime against humanity under customary international law applies solely to crimes committed after this date. This alleged crime may not be applied retroactively to crimes allegedly committed in 1975-79. As previously explained by the Defence, a law may not retroactively create a crime, or a form of liability by which that crime may be committed, as to do so would breach the *nullum crimen sine lege* principle.⁵⁷ For forced marriage to be applied against the Charged Persons in Case File 002 for alleged crimes in 1975-79, it must have been considered to be a crime against humanity under customary international law or Cambodian law in 1975-79. It is not.
23. Forced marriage was established as an international crime for the first time by the SCSL in the AFRC Trial.⁵⁸ Indeed, forced marriage "had never been recognized or even identified as a separate crime against humanity before April 2004 when the Special Court for Sierra Leone became the first ever war crimes tribunal to charge defendants with the crime of forced marriage."⁵⁹ Moreover, "no other international tribunal has heard

⁵³ Enforced Disappearance Response, paras. 22-23.

⁵⁴ Request, para. 7.

⁵⁵ AFRC Appeal Judgement, paras. 175-202; *Sesay*, para. 164.

⁵⁶ Statute of the SCSL, Article 1.

⁵⁷ *See* Enforced Disappearance Response, para. 21.

⁵⁸ Jain, *supra*, note 48, at 1014. *See also* Frulli, *supra*, note 49, at 1034.

⁵⁹ Michael Scharf & Suzanne Mattler, *Forced Marriage: Exploring the Viability of The Special Court for Sierra Leone's New Crimes Against Humanity*, Case Research Paper Series in Legal Studies, Working Paper 05-35, October 2005, at 2.

evidence of forced marriage, placing this instance of prosecution in more of an exception category, not to be considered the rule.”⁶⁰

24. Indeed the reasoning in the AFRC Appeal Judgement, allegedly recognizing that forced marriage as an inhumane act is part of customary international law, is far from convincing. The AFRC Appeals Chamber merely held that it considered that forced marriage constituted inhumane acts under the SCSL Statute and that other inhumane acts are part of customary international law and therefore may ground criminal responsibility.⁶¹ The fallacy of this logic is obvious. Taking this argument to its logical conclusion means that any subsequent development of the law expanding the number of criminal acts in a particular category, such as crimes against humanity, would retroactively apply criminal liability for these acts, as long as they fell within this category. This denudes the protection of *nullum crimen sine lege* of any meaning.
25. The AFRC Appeal Judgement also failed to address when forced marriage became part of customary international law. The fact that forced marriage falls within the jurisdiction of the SCSL in 2008, and was criminalized as an inhumane act at some point after the commencement of the SCSL’s temporal jurisdiction, does not resolve the question of when it became part of customary international law. No international convention outlawing forced marriage, nor any domestic jurisprudence ascribing criminal liability for forcing marriages was provided and relied upon by the SCSL. This is simply because in many countries, although a possible anathema to Western values, arranged or forced marriage is an accepted part of society.⁶² It was certainly not criminalized by customary international law in 1975-79.

C. There is no duty on the OCIJ to investigate forced marriage as a crime against humanity

⁶⁰ Amy Palmer, *An Evolutionary Analysis of Gender-Based War Crimes and the Continued Tolerance of “Forced Marriage”*, 7 NW. U. J. INT’L HUM. RTS. 128, 137 (2009).

⁶¹ AFRC Appeal Judgement, para. 198.

⁶² According to a research paper by the Environmental Law Centre “in cases from South America the Roman Catholic faith is involved in forced marriages. The Orthodox Jewish faith practices forced marriages and arranged marriages. Similarly forced marriages are part of some modern religions of the world.” See ELC Research Unit, *Are forced or arranged marriages a violation of human rights or a valuable cultural practice which promotes social cohesion?* Arranged or forced marriages are particularly prevalent in Asia with “at least a third of Asians practice arranged marriage.” See MM Mehndiratta, B Paul, P. Mehndiratta, *Arranged marriage, consanguinity and epilepsy*, NEUROLOGY ASIA 2007; 12 (Supplement 1): 15 – 17. Arranged marriages are especially common in India where a “very large percentage of marriages ... are arranged, and the custom of arranged marriage is a legitimized institution.” See Binaya Kumar Bastia, *Socio-cultural aspect of sexual practices and sexual offences – An Indian Scenario*, 13 J. CLIN. FORENSIC MED. 208, 210 (2006).

26. Even if forced marriage was a crime against humanity in 1975-79, it does not automatically follow that there is a consequent duty to prosecute such crimes. The weight of academic opinion appears to show that there is no duty to prosecute crimes against humanity.⁶³
27. Assuming there is a duty to prosecute crimes against humanity under customary international law, this duty does not fall on the OCIJ as claimed by the Civil Parties,⁶⁴ but on the Royal Cambodian Government (“RCG”). In democratic societies “criminal offences are clearly established by the executive. The judiciary cannot itself determine the existence of an offence *de novo* that is not prescribed in the statutes promulgated by the executive.”⁶⁵
28. Furthermore, as may be seen in the jurisprudence of the ICTY regarding the amendment of indictments, the supposed obligation to prosecute crimes against humanity and war crimes may be overridden by other factors. Trial Chambers have denied Prosecution requests to add charges to existing indictments when to do so would “cause unfair prejudice to the accused.”⁶⁶

D. Crimes against humanity under customary international law are not directly applicable in a domestic court

⁶³ Roman Boed, *The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations*, 33 CORNELL INT’L L.J. 297, 314-18 (2000) (no duty); Claudia Angermaier, *The ICC and Amnesty: Can the Court Accommodate a Model of Restorative Justice?*, 1 EYES ON THE ICC 131, 140 (2004) (no duty). Michael Scharf, *From the Exile Files: an Essay on Trading Justice for Peace*, 63 WASH. & LEE L. REV. 339, 364-367 (2006): “Though there is no question that the international community has accepted that the prohibition against committing crimes against humanity qualifies as a *jus cogens* norm, this does not mean that the associated duty to prosecute has simultaneously attained an equivalent status. In fact, all evidence is to the contrary.” Christine A. E. Bakker, *A Full Stop to Amnesty in Argentina*, 3 J. INT’L CRIM. JUST. 1106, 1114 (2005): “It is true that, with some exceptions, both national and international courts, as well as many legal scholars, still hesitate to accept the existence of *jus cogens* norms, or voice doubts about their concrete content and application. The peremptory nature of the obligation to prosecute all crimes against humanity has not been generally accepted in the legal literature. An important factor explaining this hesitation is the asserted insufficiency of state practice supporting such a peremptory norm.”

⁶⁴ Request, para. 30.

⁶⁵ Ilias Bantekas, *Reflections on Some Sources and Methods of International Criminal and Humanitarian Law*, 6 INT’L CRIM. LAW REV. 121, 125 (2006).

⁶⁶ *Prosecutor v. Delić*, IT-04-83-PT, Decision on the Submission of the Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment, 30 June 2006, paras. 53, 57-74. This unfair prejudice may manifest itself either through (1) the lack of an adequate opportunity to prepare an effective defence; or (2) undue delay to the length of the pre-trial proceedings, the date of commencement of trial and the overall length of trial. See also *Prosecutor v. Milan Lukić and Sredoje Lukić*, IT-98-32/1-PT, Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment and on Prosecution Motion to Include UN Security Council Resolution 1820 (2008) as Additional Supporting Material to Proposed Third Amended Indictment as well as on Milan Lukic’s Request for Reconsideration or Certification of the Pretrial Judge’s Order of 19 June 2008, 8 July 2008.

29. There is no convention which ascribes individual criminal liability to individuals for crimes against humanity. While the Nuremberg Charter codified this crime,⁶⁷ Article 6(c) of this same Charter makes clear that these crimes were unlikely to be found in the domestic laws of the States where these crimes were committed. Therefore, the sole basis for criminal liability for crimes against humanity is customary international law. As explained in detail before, as the ECCC is established within the existing court structure of the national legal system of Cambodia, it may only apply customary international law if permitted or obliged by Cambodian constitutional law.⁶⁸ The Establishment Law is the only law that may incorporate or implement customary international law, and this law, promulgated in 2001, may therefore only incorporate customary international law for crimes committed after that date. This would exclude the application of the alleged crime of forced marriage under customary international law for acts which occurred in 1975-79.

E. Crimes against humanity under customary international law contain an element of discriminatory intent or the ECCC may lawfully limit its jurisdiction to include this requirement.

30. The Civil Parties hold the position that “the Agreement, which holds no requirement for a discriminatory motive for crimes against humanity, should be followed.”⁶⁹ Again, all the sources relied upon post-date 1975-79. The supposed conflict between Article 9 of the Agreement and Article 5 of the Establishment Law with regards to the definition of enforced disappearance as a crime against humanity only affects the jurisdiction of the ECCC over this crime. To the extent that forced marriage as a crime against humanity was part of customary international law in 1975-79, no definition of the elements of the crime which post-dates the alleged criminal activity can be applied without clearly violating the principle of *nullum crimen sine lege*. Simply, in 1975-79, all crimes against humanity under customary international law required a discriminatory motive.⁷⁰ The Establishment Law does not therefore change the definition of crimes against humanity under customary international law; it merely reflects it.

⁶⁷ Article 5(c) of the IMT Charter in setting out the jurisdiction of the Tribunal provides that crimes against humanity are “Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.”

⁶⁸ See Enforced Disappearance Response, paras. 32-34.

⁶⁹ Request, para. 20.

⁷⁰ Article 2 of the ICTR Statute requires the discriminatory motive for all crimes against humanity.

31. The Civil Parties claim that the discriminatory intent requirement for crimes against humanity clearly limits the subject matter jurisdiction of the Court.⁷¹ To the extent that this assertion is correct, it is completely lawful and simply reflects the will of the RCG in setting up the ECCC. The Establishment Law and Agreement have also limited the temporal jurisdiction of the Court to crimes that allegedly were committed during the period from 17 April 1975 to 6 January 1979.⁷² Both instruments also limit the personal jurisdiction of the ECCC to “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia.”⁷³ This reflects similar personal and temporal jurisdictional limits in place at other *ad hoc* international courts and tribunals.⁷⁴
32. The ECCC “operates as an independent entity within the Cambodian Court Structure.”⁷⁵ As such, the RCG may, in establishing this Court, lawfully place limits on its jurisdiction, including limits on the types of crimes that it was established to prosecute. It does not violate the object and purpose of the Agreement to limit jurisdiction in this way, as claimed by the Civil Parties,⁷⁶ but actually better reflects this object and purpose by focusing on prosecutions for crimes against humanity where there is a discriminatory motive.

V. CONCLUSION & RELIEF SOUGHT

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Co-Investigating Judges to:

- a. REJECT the Request for Investigative Action.

⁷¹ Request, para. 18.

⁷² Agreement, Article 1; Establishment Law, Article 2.

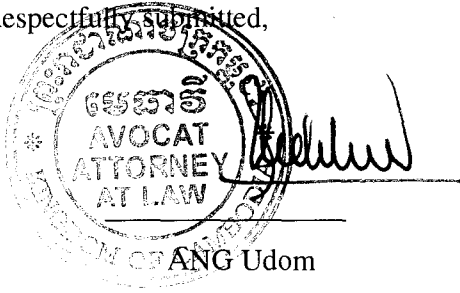
⁷³ *Id.*

⁷⁴ Article 8 of ICTY Statute limits the temporal and geographical of the ICTY to “the territory of the former Socialist Federal Republic of Yugoslavia” and “a period beginning on 1 January 1991.” Article 1 of the SCSL Statute limits personal and geographical jurisdiction to “the territory of Sierra Leone since 30 November 1996.” Article 1 of the ICTR Statute limits geographical and personal jurisdiction to the “territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring States” and temporal jurisdiction to “between 1 January 1994 and 31 December 1994.”

⁷⁵ *Case of Kaing Guek Eav “Duch”*, 001/18-07-2007-ECCC(PTC01), Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav “Duch”, 3 December 2007 para. 19.

⁷⁶ Request, para. 19.

Respectfully submitted,



ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **11th** day of **August, 2009**